Child A (a child and bringing this action through his litigation representative, Faizo bin Yaacob) v Dr Sivakumar a/l Sivalingam & Ors

HIGH COURT (KUALA LUMPUR) — CASE NO WA-23NCvC-89–09 OF 2021
SU TIANG JOO JC
27 SEPTEMBER 2023

Civil Procedure — Action — Withdrawal of claim — Infant plaintiff through father as litigation representative sued doctors and hospital for negligently causing his limbs to be amputated — Two years after filing suit plaintiff informed court he wanted to withdraw it because he had no funds to pursue with his claim — Defendants agreed to withdrawal on condition plaintiff was not given liberty to file suit afresh — Court allowed withdrawal but refused to impose defendants' condition — Whether condition imposed by defendants was unjust because it denied infant plaintiff of right to seek remedy for wrong done to him just because of impecuniosity — Whether court had duty to act in loco parentis to protect child's interest and welfare — Whether child should not be denied of right to bring his claim when he had attained age of majority — Limitation Act 1953 s 24

The infant in this action ('Child A'), suing through his father as his litigation representative, brought the instant negligence action against the two defendant doctors and the third defendant hospital where the said doctors had performed surgeries on him. Child A's parents claimed that they did not give an informed consent for the boy to undergo the surgeries which, due to alleged negligence and breach of duty of care, resulted in Child A's right hand and both his legs below his knees being amputated. The defendants denied any negligence on their part. The third defendant brought third-party proceedings against the defendant doctors, claiming contribution and indemnity from them in the event it was found liable to Child A. The instant action was commenced when Child A was eight years old. Two years later, during case management, Child A's lawyers informed the court that they had instructions to withdraw the action with no order as to costs because the plaintiff did not have the financial means to pursue with his claim. The lawyers for the defendants had no objections but said that it agreed that the withdrawal was on condition the plaintiff did not have liberty to file the suit afresh. After initially recording a consent order that the action be struck out with no order as to costs and without liberty to file afresh, the judge, troubled by the plaintiff's reason for withdrawing the action, subsequently held a conference with the lawyers acting for all the parties and after confirming that the consent order had yet to be drawn up and perfected, amended the consent order to remove the condition that the suit was

withdrawn without liberty to file afresh. The defendants filed an appeal against the decision. A

Held, the court's reasons for recalling and amending the consent order:

(1) It was well within the jurisdiction of the court in the interest of justice, to vary a consent order to which parties had agreed to when the order had not yet been drawn up and sealed. A settlement arrived at by the parties on terms did not merely by such agreement result in it being an order or judgment of the court. The court would normally scrutinise the proposed settlement before endorsing the same. The court should not act as a rubber stamp and ought not to record a term that would contravene any law (see paras 12–13 & 15). B C

(2) Whilst the settlement in the instant case would result in the action being disposed of expeditiously and economically, the question was whether it was disposed of justly. The merits of the plaintiff's claim had not been adjudicated allegedly due to his impecuniosity. Therefore, it was unjust to order the action to be struck off without giving the plaintiff the liberty to file afresh as: (a) the principle of law was that there was no wrong that had no remedy; (b) the court had a duty as *loco parentis* to act in the best interests of the child. Therefore, if the consent order did not look after the child's interest and/or was abusive or oppressive in nature, the court should act in place of the parent and protect the child's interest and welfare. In this case, the court ought to step in and look after Child A's rights when his parent had thrown his hands up in despair and purported to give up the boy's rights on account of impecuniosity; (c) Child A had yet to attain the age of majority to take over the proceedings from his litigation representative who was unable or unwilling to continue with the action. The impecuniosity of Child A's parents or his litigation representative should not be visited upon the minor plaintiff to take away his entrenched right to bring an action within one year from the date he ceased to be a minor. It was unjust to deprive Child A of his rights that were protected by s 24 of the Limitation Act 1953; (d) it was unjust to give effect to an order that would result in a child being stripped of his rights based upon the avowed impecuniosity of his father who was his litigation representative. Whether or not it would be an abuse of process if a fresh action was subsequently filed for the same cause of action was a matter that had to be ventilated if and when the plaintiff re-filed the action; and (e) parties to an action did not have the absolute right to withdraw the action on their own terms. In overseeing the administration of justice, the court would, where appropriate, refuse to accede to any term of settlement proposed by any party to the proceedings which was unjust, and that would include the taking away of a vested right of a person who was under a disability (see paras 17–26, 33–34, 37, 39 & 42). D E F G H I

[Bahasa Malaysia summary

Bayi dalam tindakan ini ('Child A'), yang menyaman melalui bapanya sebagai wakil litigasinya, membawa tindakan kecuaian semasa terhadap dua doktor defendan dan hospital defendan ketiga di mana doktor tersebut telah melakukan pembedahan ke atasnya. Ibu bapa Child A mendakwa bahawa mereka tidak memberi kebenaran untuk kanak-kanak lelaki tersebut menjalani pembedahan yang, disebabkan dakwaan kecuaian dan pelanggaran tugas berhati-hati, mengakibatkan tangan kanan Child A dan kedua-dua kakinya di bawah lututnya dipotong. Defendan menafikan sebarang kecuaian di pihak mereka. Defendan ketiga membawa prosiding pihak ketiga terhadap doktor defendan, menuntut bertanggungan dan indemniti daripada mereka sekiranya didapati bertanggungjawab terhadap Child A. Tindakan semasa dimulakan ketika Child A berusia lapan tahun. Dua tahun kemudian, semasa pengurusan kes, peguam Child A memaklumkan kepada mahkamah bahawa mereka mempunyai arahan untuk menarik balik tindakan tanpa perintah mengenai kos kerana plaintif tidak mempunyai sumber kewangan untuk meneruskan tuntutannya. Peguam defendan tidak mempunyai bantahan tetapi menyatakan bahawa ia adalah dipersetujui bahawa penarikan balik itu adalah dengan syarat plaintif tidak mempunyai kebebasan untuk memfailkan saman itu semula. Selepas pada mulanya merekodkan perintah persetujuan bahawa tindakan itu dibatalkan tanpa perintah mengenai kos dan tanpa kebebasan untuk memfailkan semula, hakim, yang bimbang dengan alasan plaintif untuk menarik balik tindakan tersebut, kemudiannya mengadakan persidangan dengan peguam yang bertindak untuk semua pihak dan selepas mengesahkan bahawa perintah persetujuan masih belum disediakan dan disempurnakan, meminda perintah persetujuan untuk membuang syarat bahawa saman tersebut ditarik balik tanpa kebebasan untuk memfailkan semula. Defendan memfailkan rayuan terhadap keputusan itu.

Diputuskan, alasan mahkamah untuk menarik balik dan meminda perintah persetujuan:

(1) Ia adalah dalam bidang kuasa mahkamah demi kepentingan keadilan, untuk mengubah perintah persetujuan yang telah dipersetujui oleh pihak-pihak apabila perintah tersebut belum lagi disediakan dan dimeteraikan. Penyelesaian yang dicapai oleh pihak-pihak atas terma bukan semata-mata melalui perjanjian tersebut menyebabkan ia menjadi perintah atau penghakiman mahkamah. Mahkamah biasanya akan meneliti penyelesaian yang dicadangkan sebelum mengesahkan penyelesaian yang sama. Mahkamah tidak sepatutnya bertindak sebagai 'rubber stamp' dan tidak sepatutnya merekodkan terma yang akan melanggar mana-mana undang-undang (lihat perenggan 12–13 & 15).

(2) Walaupun penyelesaian dalam kes semasa akan mengakibatkan tindakan tersebut dilupuskan dengan cepat dan ekonomik, persoalannya adalah

sama ada tindakan tersebut dilupuskan secara adil. Merit tuntutan plaintif tidak diputuskan atas dakwaan kerana ketidakmampuan beliau. Oleh itu, ia adalah tidak adil untuk mengarahkan tindakan tersebut dibatalkan tanpa memberi plaintif kebebasan untuk memfailkan semula kerana: (a) prinsip undang-undang adalah tiada kesalahan yang tiada remedi; (b) mahkamah mempunyai kewajipan sebagai *loco parentis* untuk bertindak demi kepentingan terbaik kanak-kanak. Oleh itu, jika perintah persetujuan tidak menjaga kepentingan kanak-kanak dan/atau bersifat mendera atau menindas, mahkamah harus bertindak menggantikan ibu bapa dan melindungi kepentingan dan kebajikan kanak-kanak tersebut. Dalam kes ini, mahkamah sepatutnya mengambil bahagian dan menjaga hak Child A apabila ibu bapanya telah berputus asa dan kononnya melepaskan hak kanak-kanak tersebut kerana ketidakmampuan; (c) Child A masih belum mencapai umur dewasa untuk mengambil alih prosiding daripada wakil litigasinya yang tidak mampu atau tidak mahu meneruskan tindakan tersebut. Ketidakmampuan ibu bapa Child A atau wakil litigasinya tidak sepatutnya dilihat ke atas plaintif bawah umur untuk merampas haknya yang sedia ada untuk membawa tindakan dalam tempoh satu tahun dari tarikh beliau tidak lagi di bawah umur. Ia adalah tidak adil untuk melucutkan hak Child A yang dilindungi oleh s 24 Akta Had Masa 1953; (d) ia adalah tidak adil untuk melaksanakan perintah yang akan mengakibatkan seorang kanak-kanak dilucutkan haknya berdasarkan ketidakmampuan yang diperakui oleh bapanya yang merupakan wakil litigasinya. Sama ada ia akan menjadi penyalahgunaan proses jika tindakan baharu kemudiannya difailkan untuk kausa tindakan yang sama adalah satu perkara yang perlu diberi perhatian jika dan apabila plaintif memfailkan semula tindakan tersebut; dan (e) pihak dalam sesuatu tindakan tidak mempunyai hak mutlak untuk menarik balik tindakan tersebut atas syarat mereka sendiri. Dalam mengawasi pentadbiran keadilan, mahkamah akan, jika sesuai, enggan menerima sebarang terma penyelesaian yang dicadangkan oleh mana-mana pihak kepada prosiding yang tidak adil, dan itu termasuk mengambil hak milik seseorang yang berada di bawah ketidakupayaan (lihat perenggan 17–26, 33–34, 37, 39 & 42).]

Cases referred to

Anita Kushwaha vs Pushap Sudan AIR (2016) SC 3606; (2016) 8 SCC 509, SC (refd)

Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors [2013] 7 MLJ 196, HC (refd)

Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors [2002] 6 MLJ 619; [2002] 4 CLJ 694, HC (refd)

Imdadurrahman bin Hithayatullah (seorang kanak-kanak yang menyaman melalui bapa dan wakil litigasinya, Hithayatullah bin Sultan) v Pearl

Maternity Hospital Sdn Bhd & Anor [2021] MLJU 401; [2021] 1 LNS 327, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)
Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433, HC (refd)
Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133; [2018] 3 CLJ 1, FC (refd)
Ling Peek Hoe & Anor v Ding Siew Ching & Ors [2022] 12 MLJ 658; [2022] 7 CLJ 412, HC (refd)
Malayan Banking Bhd v Kumpulan Liziz Sdn Bhd & Ors (DSE Construction Sdn Bhd & Ors, third parties) [2022] MLJU 1501; [2022] 1 LNS 1500, HC (refd)
Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)
PP v Mohamad Shafie bin Abdul Rani [2022] 7 MLJ 948; [2022] 1 CLJ 318, HC (folld)
Phua Chin Chew & Ors v KM & Ors [1987] 2 MLJ 604, SC (refd)
Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 2 MLJ 181, FC (refd)
Sean O'Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137, FC (folld)
Soo Pao Ching (P) v Foo Say Suan [2021] MLJU 2000, HC (refd)

Legislation referred to

Limitation Act 1953 s 24
Rules of Court 2012 O 21, O 21 r 3(1), O 34, O 34 r 2(5)

Komal Vijay Sheth (Preakas & Partners) for the plaintiff.
Latifa Haiqa bt Yusoff (Raja, Darryl & Loh) for the first and second defendants.
Tan Pui Yi (Azim, Tunku Farik & Wong) for the third defendant.

Su Tiang Joo JC:

INTRODUCTION

[1] This court was informed by the solicitors for the parties to this action that they have agreed for the action to be withdrawn and struck out without any order for costs *and without liberty to file afresh*. They sought for a consent order to this effect to be recorded. Upon being apprised by learned counsel for the plaintiff who is a minor suing the two defendant doctors and the third defendant hospital that the plaintiff is withdrawing the action because the plaintiff is in no financial position to continue with the suit, the court allowed the action to be struck out with no order as to costs *but refused to record the*

condition that the plaintiff shall have no liberty to file afresh. Dissatisfied, the third defendant hospital appealed and this was followed by the first two defendants who jointly filed a separate appeal. These are the grounds of judgment for the two separate appeals.

PARTIES

[2] The plaintiff in this case is a minor, currently at the tender age of ten years. When he commenced this action through his father as his litigation representative, he was only eight years old.

[3] The first two defendant doctors had operated on the plaintiff in the third defendant hospital.

NATURE OF CLAIM

[4] The parents claimed they did not give an informed consent for the plaintiff to undergo the several surgeries performed upon him whilst under the care of the defendants and as a result of the surgeries and breach of duty of care, the plaintiff's right hand and both his legs below his knees were amputated.

[5] The plaintiff grounded his claim on negligence on the part of the defendants who denied the same. The third defendant had taken out third party proceedings claiming for contribution and indemnity against the first two defendants in the event it is found liable to the plaintiff.

SALIENT FACTS LEADING TO THE WITHDRAWAL OF THE ACTION

[6] The court was informed by the plaintiff's solicitor during the case management on 5 July 2023 that they have instructions to withdraw the action and sought that there be no order as to costs. She added that the claim is being withdrawn because the plaintiff is *in no financial position to proceed further with the claim*.

[7] The lawyers representing the defendants have no objections to the plaintiff's intention to withdraw but informed the court that it was agreed that it be without liberty to file afresh. This court allowed the plaintiff to withdraw its action and ordered the action to be struck out with no order as to costs and without liberty to file afresh.

[8] However, I was troubled by the reason given by the solicitor for the plaintiff for the withdrawal the action. Upon my instructions, the learned deputy registrar, Puan Shaarmini a/p Arjunan informed the respective

solicitors for the parties of my wish to see them. A case management date suitable for them was scheduled for the 7 July 2023, and after having confirmed with the respective solicitors that the consent order made on 5 July 2023 has not been drawn up, passed, perfected and entered, I had expressed my reservations whether it is just that the plaintiff who is a minor is abandoning his claim without liberty to file afresh due to impecuniosity.

[9] The solicitor for the plaintiff reiterated that the reason for withdrawing the claim is due to impecuniosity. The solicitors for the defendants on the other hand, asserted that the settlement to be recorded in the form of the consent order was agreed upon with the condition of 'without liberty to file afresh'. After hearing them, I proceeded to alter the draft consent order made on 5 July 2023 by removing the condition that the withdrawal of the action is without liberty to file afresh. I set out my reasons for doing so.

APPLICATION TO WITHDRAW THE ACTION — O 21 AND O 34 OF THE RULES OF COURT 2012 ('THE ROC 2012')

[10] The law is settled and clear on the jurisdiction of the court when it involves an application to discontinue or withdraw an action. Order 21 r 3(1) of the ROC 2012 provides that:

> Discontinuance of action with leave (O 21, r 3)
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> 3(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the *Court hearing an application for the grant of such leave may order the action* or counterclaim to be discontinued, or any particular claim made therein to be struck out, *as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.*

[11] Order 34 r 2(5) of the ROC 2012 further provides that:

> (5) *At any time during the pre-trial case management where the parties are agreeable to a settlement of some or all of the matters in dispute in the action or proceedings, the Court may enter judgment in the action or proceedings or make such order to give effect to the settlement.* (Emphasis added.)

[12] The jurisdiction and power to make any order is vested upon the court. A settlement arrived at by the parties on terms does not by such agreement result in it being an order or judgment of the court. The court will normally scrutinise the proposed settlement before endorsing the same. It cannot be gainsaid that the court ought not to record a term that would contravene any law. The court should not act as a rubber stamp. This court had occasion to say in the case of *Malayan Banking Bhd v Kumpulan Liziz Sdn Bhd & Ors (DSE Construction Sdn Bhd & Ors, third parties)* [2022] MLJU 1501; [2022] 1 LNS

1500 at paras [34] and [35] that:

> [34] In disallowing the proposed consent order (encl 125), I had exercised this court's discretion not to approve the same. Needless to say, the jurisdiction and power to make any (court) order is vested upon the court. Just because the parties have agreed to an order to be made, it does not mean, that the court should act as a rubber stamp to endorse the same without first scrutinising the same.
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> [35] Further, O 34 r 2(5) of the ROC 2012 provides that at any time during the pre-trial case management where the parties are agreeable to a settlement of some or all of the matters in dispute in the action or proceedings, the court *may* enter judgment in the action or proceedings or make such order to give effect to the settlement. That the word 'may' as opposed to 'shall' or 'must' is used, makes it clear that a discretion is conferred upon the court as to whether to give effect to the settlement, see the recent helpful and comprehensive construction of the use of the word 'may' in *Taza bin Tarji v Public Prosecutor and another appeal* [2020] MLJU 1822; [2020] 1 LNS 1590 (CA) at para [10]. In the exercise of this court's discretion, I had disallowed the proposed settlement made by D2 & D3 with the third party in the form of the proposed consent order (encl 125) because to allow the same would not serve the overriding interest of justice to have the action disposed of *justly, expeditiously and economically*. (Emphasis added.)

[13] Moreover, it is also well within the court's jurisdiction to *vary a consent order* to which parties have agreed to, in the interest of justice. On this issue of varying an order, the law is settled. In the case of *Commercial Plastic Industries Sdn Bhd v Lim Chin Cheap & Ors* [2002] 6 MLJ 619; [2002] 4 CLJ 694, Ramly Ali J (later FCJ) held:

> It is now well settled that an order pronounced by a court can always be withdrawn, altered, or modified by the same court until it is drawn up, passed and perfected. It is also well settled that when a court has pronounced judgment, it retains control over the case until the order giving effect to its judgment is formally perfected; such control however, must be used in accordance with judicial discretion. The principle relating to the power of a court to recall an unperfected order has been laid down by the English Court of Appeal in *Re Harrison's Settlement* [1955] 1 All ER 185. This principle was followed by our Federal Court in the case of *Ling Nam Rubber Works v Leong Bee & Co (No 2)* [1968] 1 MLJ 265; [1968] 1 LNS 73. It was also followed by our High Court in *Syarikat Marak Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417; [1991] 4 CLJ Rep 22 at 627 and *Owners of Cargo carried in the Ship Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng' (No 2)* [1998] 6 MLJ 492; [1998] 5 CLJ 548.
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> This power is exercisable whether it is an order made in open court or in chambers, or whether the order is by consent or otherwise, so long the order has not been perfected, ie, drawn up, passed and entered (see *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch D 273).

[14] See also *Chew Hon Keong v Betterproducts Industries Sdn Bhd & Ors* [2013] 7 MLJ 196 (HC), where Mary Lim J (now FCJ) held:

A [36] From all these decisions, it can be safely concluded that the courts do not decline revisits to an earlier order made, especially one made by itself, simply on the basis of no jurisdiction. The first rule, of course, is that once perfected, a proper order is not to be varied, altered or amended. It remains closed *unless*, of course, *'in the circumstances the jurisdiction exercised by the court is justified' —; per Raja Azlan Shah CJ (as His Highness then was) in Ganapathy Chettiar, p 146*.

B [37] *In determining whether the circumstances warrant a second look at the terms of the order, including one reached by consent, the terms* and the conduct of the parties *are relevant considerations*. (Emphasis added.)

C **[15]** In this case, the parties confirmed that the order made on 5 July 2023 was neither drawn up by the parties nor sealed by this court. In the light of the cases above, it is therefore, clear that this court has the jurisdiction and power to vary the same.

D **[16]** Right at the outset, the reasons for reconsidering the 'without liberty to file afresh' condition is that whilst the settlement will see that action being disposed of expeditiously and economically at this stage of the proceedings, my conscience is troubled by *whether it had been disposed of justly*. The merits of the minor plaintiff's claim have not been adjudicated allegedly due to his E impecuniosity. Besides his limbs having been amputated, are his legal rights to be prematurely cut off too? In the interest of justice, I felt it was not just to do so and I rely upon the following principles of law:

(a) no wrong without a remedy;

F (b) court's duty to act as *loco parentis*;

(c) child under a disability;

(d) past impecuniosity may not bar a fresh suit from being filed; and

G (e) court's overarching duty to do justice.

No wrong without remedy

[17] The Latin maxim *ubi jus ibi remedium*; where there is a right there is a H remedy is of relevance. In *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301, Gopal Sri Ram JCA at pp 319–321 had this to say and which resonates well with this court:

I The law is not so impotent that it will let an injustice pass by while having its limbs bound by procedural technicalities. As Ong Hock Sim FJ said in *Othman v Mek* [1972] 2 MLJ 158:

> ... it is the duty of the courts to exercise the utmost diligence in applying the maxim *ubi jus ibi remedium*, so that justice shall be done, unless we are strictly constrained by law to uphold any decision which results in injustice.

The court's duty as loco parentis and to act in the best interest of the child

[18] In *Rosliza bt Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, the Federal Court essentially expressed that where a minor is concerned, the paramount consideration for the court is to safeguard the welfare of the minor and to decide in the best interests of the said minor.

[19] In the case of *Soo Pao Ching (P) v Foo Say Suan* [2021] MLJU 2000 (HC), Hayatul Akmal Abdul Aziz J held that the court is allowed to interfere and not enforce a consent order when such agreement is unfair and at para [20] Her Ladyship decided as follows:

> [20] ...
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> The legal position on a consent order is settled:
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> (vi) The nature of a consent order.
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> (d) The foundation upon which a consent order is constructed is based on the maxim, *consensus ad idem*, as to the terms and conditions of settlement between the parties, brought before the presiding judge for it to be formally recorded before the court. Therefore, a consent order must be given its full terms and effect against the parties, where neither party must be allowed to renege from the contractual obligations sealed in that consent order. The FC in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909, ruled:
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> > The grounds referred to for setting aside a consent order of a judgment by consent are grounds which basically relate to *consensus ad idem* of parties to a binding agreement or contract. It is elementary that if it is proved that there are grounds which vitiate such free consent, the agreement is not binding. If the agreement upon which a consent order or judgment by consent is based is vitiated by elements, such as fraud, mistake, total failure of consideration, then such a perfected consent order or judgment by consent could be set aside in a fresh action filed for the purpose.
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> *Lau Hui Sing v Wong Chou Yong* [2008] 5 MLJ 846 (HC), held that it might not enforce consent orders which are abusive and oppressive in nature:
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> *After looking at the consent order*, which was expected to include terms relating to maintenance, [I] *took the view that the consent order is not only oppressive against the ex-wife but one that is an abuse of process and warrants the court to initiate contempt proceeding on its own motion*, as such non-disclosure of assets as well as the application without justifiable reasons attempts to undermine the dignity of the court and court proceedings. *Here, despite there being no issue regarding consent, the fact that the terms of the order were clearly against the wife's favor allows the court to intervene*. (Emphasis added.)

[20] I find further support from the decision of the Federal Court in *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137 which held that:

> [53] According to *Halsbury's Laws of England* (4th Ed) reissue (Mackay Edition), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English Children Act under the heading *welfare of the child' is a set of factors that must be taken into account when deciding on such cases*. These are for example: the wishes of the child; his feelings; *his age*; his sex and *his background and the capabilities of the parties involved*. Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases.
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> [56] And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20 at p 21:
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> > The expression 'welfare' under s 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed) is to be taken in its widest sense. *It means the general wellbeing of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his wellbeing*. A loving parent with a stable home is conducive to the attainment of such wellbeing. It is not to be measured in monetary terms.
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> [57] And when deliberating, *the court should adopt 'a process whereby, when all the relevant facts*, relationship, claims and wishes of parents, (and potential adopters) *risks, choices and other circumstances are taken into account and weighted, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood* — Lord MacDermott in *J and another v C and others* [1970] AC 668 at pp 710–711 and *Halsbury Laws of England* (4th Ed), Reissue, (Mackay), para 443.
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> [58] As we have suggested, the meaning of *welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision*. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided cases as precedent has limited application. In this respect we answer the third question in the positive. (Emphasis added.)

[21] Therefore, if and when the court comes across a consent order where the interest of the child is not looked after and/or abusive and oppressive in nature, the court should act as *loco parentis*, in simple terms, to act or put itself in the place of a parent and protect the child's interest and welfare. In this case, the court ought to step in to look after the rights of the child when his parent has thrown up his hands in despair and purports to give up the rights of the child by reason of impecuniosity. On impecuniosity, this will be discussed in greater detail below.

Child under disability

[22] The plaintiff has yet to attain the age of majority *to take over the proceedings* from his litigation representative whom legal counsel asserted, no longer has the financial means to do so.

[23] I find the following findings of Justice Amarjeet Singh Serjit Singh JC (now J) in *Imdadurrahman bin Hithayatullah (seorang kanak-kanak yang menyaman melalui bapa dan wakil litigasinya, Hithayatullah bin Sultan) v Pearl Maternity Hospital Sdn Bhd & Anor* [2021] MLJU 401; [2021] 1 LNS 327 on the provisions on disability in s 24 of the Limitation Act 1953 to be helpful for this case and I quote the following passages in extenso:

> [26] Section 24 provides that a person under disability as defined in s 2(2) of the Act is one who is either an infant or a person of unsound mind or an infant who is of unsound mind. *The purpose of the section is to ensure that such persons are not deprived of their remedies due to their inability to start proceedings by providing an extended time to commence such actions notwithstanding that the prescribed period of limitation has lapsed*.
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> [27] The plaintiff in the instant case is a child aged 13 years at the time this judgment was delivered. According to the Interpretation Acts 1948 and 1967, in view of the fact that an infant is not defined in the Act, the word 'infant' has the same meaning as 'minor' which is further defined to mean: a person who has not attained the age of majority prescribed by the law applicable to him. The age of majority prescribed under the Age of Majority Act 1971 is eighteen years. *Thus, the plaintiff in the instant case could only in his own right start proceedings when he reaches the age of majority*.
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> [41] Thus, following the interpretation stated in *Phua Chin Chew* (*infra), since the minor in the instant case has yet to reach his age of majority, time for the purposes of the period of limitation is yet to commence. *Time will only commence on the minor's eighteenth birthday*. Only then he would be possessed with the legal capacity to commence an action on his own right. Nevertheless, the plaintiff while still a minor is permitted at any time to bring legal proceedings on the right of action accrued to him through his next friend or litigation representative. (Emphasis added.)

[24] With the litigation representative here being unable or unwilling to continue with the action on behalf of the minor, and with the minor plaintiff not being possessed with the legal capacity to take over and continue with the action in his own right, in my considered view it would be unjust for his rights which are protected by s 24 the Limitation Act 1953 to be cut off.

[25] The impecuniosity of the parents or in this case, his litigation representative should not be visited upon the minor plaintiff to take away his entrenched right to bring an action within one year from the date he ceases to be a minor.

[26] Syed Agil Barakbah SCJ speaking for the Supreme Court in *Phua Chin*

A *Chew & Ors v KM & Ors* [1987] 2 MLJ 604 at p 609 made it clear that the Limitation Act safeguards the position of persons under disability so that the period of limitation commences from the date when the person ceases to be under disability or died.

B *Impecuniosity/abuse of process?*

[27] As mentioned above, this court was informed that the reason the plaintiff is withdrawing the suit is because he and his litigation representative does not have the financial means to proceed with the suit. This leads to the C inference that besides being a minor, his access to justice is being impeded by reason of his impecuniosity.

[28] The solicitor being unprepared to proceed without being paid had D obviously agreed to the action being withdrawn and struck out without liberty to file afresh, and the question arises as to whether interest of the minor is being protected?

[29] In *Ling Peek Hoe & Anor v Ding Siew Ching & Ors* [2022] 12 MLJ 658; E [2022] 7 CLJ 412 (HC) this court had occasion to hold that:

> [89] As a matter of fundamental principle, an advocate and solicitor can lawfully be retained to act for a client with his fees to be paid at a later point in time even after the case has been concluded. There is no law to prevent an advocate and solicitor who is so kind as to agree for his fees to be paid only when the client is able to do so. F It would be tragic if there is such a law, as that would mean that, many a right would be more illusory than real like in this case when an ice-cream seller takes on the might of a money lender.
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> [90] In the UK, it was held that *there was nothing wrong for a solicitor to conduct an action on credit*, see *Singh And Another v Observer Ltd* [1989] 3 All ER 777. G (Emphasis added.)

[30] However, as the solicitors for the plaintiff are not prepared to give further credit for the further conduct of the action, and hence with due respect, H it calls into question whether the interest of the minor is being protected when the withdrawal of the action without liberty to file afresh was agreed upon.

[31] In *Anita Kushwaha vs Pushap Sudan* AIR (2016) SC 3606; (2016) 8 SCC 509 at para 13, TS Thakur, the Chief Justice of India quoted the I following passage from the book 'Access to Justice' (Vol I) of Prof M Cappelletti Rabel which resonates very well with this court on the importance of access to justice:

> The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the

enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. *Effective access to justice can thus be seen as the most basic requirement — the most 'basic human right'* — of a system which purports to guarantee legal right. (Emphasis added.)

[32] At para 14 in *Anita Kushwaha*, TS Thakur CJI traced the history of the right to a remedy when any right is breached by saying:

14. Courts in England have over the centuries post Magna Carta developed fundamental principles of common law which are enshrined as the basic rights of all humans. These principles were over a period of time recognised in the form of Bill of Rights and Constitutions of various countries which acknowledged the Roman maxim 'Ubi Jus Ibi Remedium' ie every right when it is breached must be provided with a right to a remedy.

[33] Taking into account all the principles above, this court is of the considered view that an injustice would be done to give effect to an order that will result in a child being stripped of his rights, based upon the avowed impecuniosity of his litigation representative who is his father.

[34] The underlying objection raised by the defendants, is that the filing afresh by the plaintiff would be an abuse of process. I make no decision on this save to say that this is not a certainty, and is to be decided if and when the plaintiff were to do so.

[35] As Lord Bingham, the illustrious former Lord Chief Justice of England and Wales said in the celebrated case of *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (House of Lords) at p 31:

... It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. *Thus, while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant*, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, *it is in my view preferable to ask whether in all the circumstances* a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, *to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the*

legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

[36] Our Federal Court in *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; [2018] 3 CLJ 1 applied the principle in *Johnson* and held that:

> [44] This brings into focus again the approach on the determination of an abuse of the process distilled from the speech by Lord Bingham in *Johnson*, which we apply. The approach should be:
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> > [a] broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.
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> [45] The 'merits' in the phrase 'broad merits-based judgment' were not the substantive merits or otherwise of the actual claim, but those relevant to the question whether the claimant could or should have brought his claim as part of the earlier proceeding (see *Stuart v Goldberg Linde* [2008] 1 WLR 823, at 840, per Lloyd LJ).
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> [46] We should also bear in mind that:
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> > one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

[37] In my considered view, if the plaintiff were to file afresh, the issue of whether his fresh action would be an abuse of process can be ventilated with he being at liberty to lay all the facts of why he had to withdraw his claim including that of impecuniosity and his current disability as a minor.

The court has an overarching duty to do justice

[38] At the risk of repetition, this court is of the view that to allow the proposed order as agreed between the parties for the case to be withdrawn without liberty to file afresh on the ground that the plaintiff does not have the financial means to proceed with his case would cause severe injustice to the plaintiff. As expressed by Faiza Tamby Chik J in the case of *Kanawagi s/o Seperumaniam v Penang Port Commission* [2001] 5 MLJ 433 (HC), at p 468:

> ...; the court is *lex non deficit in justitia exhibenda* which in simple English means that the law does not fail in dispensing justice.

[39] In my considered view, parties to an action before the court do not have the absolute right to withdraw a case on their own terms. This principle of law has been applied in a criminal case. See *Public Prosecutor v Mohamad Shafie bin*

Abdul Rani [2022] 7 MLJ 948; [2022] 1 CLJ 318 (HC). A

[40] In *Mohamad Shafie* from paras [38]–[42] the High Court held:

> [38] By analogy, before allowing an appeal to be withdrawn by any party, *it behooves the court to exercise its discretion judicially in order to ensure that the ends of justice are met*. B
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> [40] However, it has since been settled in an unanimous decision of our apex court comprising a panel of seven Federal Court judges in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209; [2021] 6 CLJ 199 that:
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> > [112] Article 145(3) of the FC provides the AG/PP (Attorney-General/Public Prosecutor) with a wide discretion to institute, conduct or discontinue any proceeding for a criminal offence. This wide discretion means the AG/PP has sole and exclusive discretion in that only he/she can exercise such power. *However, the AG/PP does not have absolute or unfettered discretion under art 145(3)*. As alluded to in the preceding discussion and following from it, it is our judgment that in appropriate, rare and exceptional cases, such discretion is amenable to judicial review. (Emphasis added.) C D
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> [41] See also *Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] 4 CLJ 561 where the Federal Court at para [81] held that the reassertion by the Federal Court of its constitutional judicial power and its status as a superior court meant that the power of the Attorney General to grant or refuse consent under s 9(1) of the Government Proceedings Act 1956 (Revised 1988) (Act 359) to institute a suit or be joined as a party in any existing suit on behalf of the government or the public in any matter pertaining to public, religious, social or charitable trusts is amenable to judicial review. E F
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> [42] In a nutshell, the perceived absolute discretion of the Public Prosecutor in art 145(3) of the Federal Constitution is not absolute. The aforementioned Federal Court cases of *Sundra Rajoo Nadarajah* and *Peguam Negara Malaysia* lend support to the point that *once a case comes within the purview of the court, the court will be armed with all the judicial powers to oversee the administration of justice*. G
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> [43] Having read the papers in these three appeals, I was of the considered opinion that in the interest of justice, further inquiries ought to be made and that the prosecution ought to reconsider whether it ought to withdraw the appeals. With the prosecution having done so and having decided that there are merits to pursue the appeals both on the facts and the law, the matter will be heard but of course, in the presence of the respondent and his learned counsel. H
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> [44] *In acting as the court has done in this case, the court is conscious that justice is for all in the entire community including the children alleged to have been sexually assaulted and not only for the respondent*. In *Liaw Kwai Wah & Anor v Public Prosecutor* [1987] 2 MLJ 69; [1987] 1 CLJ 35 at p 165, the Supreme Court speaking through Abdul Hamid Omar CJ (Malaya) (as His Lordship then was) held that: I
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> > *We would also observe that the object of revisionary powers provided for in the Code is:*

> *... to confer upon criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions or apparent harshness of treatment, which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand, in some undeserved hardship to individuals.*

[45] In *Saied Safarigharigh lwn Public Prosecutor* [2016] MLJU 972; [2017] 1 CLJ 426 (CA), Abdul Rahman Sebli JCA (now FCJ) cited with approval the case of *Bird Dominic Jude v Public Prosecutor* [2014] 3 MLJ 745; [2014] 4 CLJ 133 (FC) which held that:

> The law on point is therefore s 56A of the CJA which is designed to confer judicial power upon the court to grant an order that will have the effect of preserving the integrity of any criminal appeal pending before it. It is intended to facilitate a full hearing of the appeal on its merit so *that justice is not only done to the accused but also the public and state*. (Emphasis added.)

[41] In *Mohamad Shafie* at paras [33] and [34] I observed that:

> [33] In *Ahmad Zahid bin Hamidi v Public Prosecutor* [2019] MLJU 1872; [2019] 1 LNS 1987, the High Court had to deal with an application by Ahmad Zahid Hamidi to amalgamate the 12 charges of criminal breach of trust by a public servant or agent levelled against him under s 409 of the Penal Code into three pursuant to s 153(2) of the CPC. The Public Prosecutor opposed the application, asserting that Ahmad Zahid Hamidi cannot be allowed to succeed in his challenge against the discretionary powers of the Attorney-General as the Public Prosecutor has the absolute discretionary power to decide how to institute criminal proceedings under art 145(3) of the Federal Constitution and also that the court has no jurisdiction to entertain this application. Although Collin Lawrence Sequerah J did not allow the application, His Lordship, however, held that:
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> > [58] While the prosecution can properly exercise its powers to institute, conduct or discontinue any proceedings for an offence pursuant to Constitution, the *moment the case is registered with the court, the court is vested with jurisdiction to entertain such applications to amalgamate charges in an appropriate case*.
> >
> > [59] *Therefore, if it thought that the prosecutor was improperly exercising the power under* art 145(3) of the Federal Constitution and s 376(1) of the CPC, *the court can and will interfere to correct such exercise*.
> >
> > [60] However, in the circumstances of this particular case, the court saw no good reason or rationale for so exercising its powers to that end. *The respondent's submission therefore that this court had no jurisdiction to entertain such application as to do so would usurp the powers of the public prosecutor are devoid of any merit*. (Emphasis added.)
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> [34] *The aforesaid words said in the context of the court having the power to amalgamate charges once proceedings for offences are registered with the court is premised upon the court having the judicial power to oversee that there is no miscarriage of justice.* (Emphasis added.)

[42] Although the above case of *Mohamad Shafie* is a criminal case, the principle would equally apply to this civil action presently before this court, that is, this court has the power to take charge of each and every case that are registered with the court to oversee the administration of justice, and where appropriate, refuse to accede to any term of settlement proposed by any party to the proceedings which it considers unjust, and unjust here would include the taking away of a vested right of a person under a disability.

CONCLUSION

[43] Wherefore, this court altered the consent order by removing the condition that the action of the (minor) plaintiff is to be struck out 'without liberty to file afresh'.

Order accordingly.

Reported by Ashok Kumar